

EVERETT W. NIXON
Claimant

THE BOEING CO.
Respondent

AETNA CASUALTY & SURETY CO.
Insurance Carrier

KANSAS WORKERS COMPENSATION FUND

Claimant appeared by and through his attorney, Kelly W. Johnston of Wichita, Kansas. Respondent and its insurance carrier appeared by and through their attorney, Frederick L. Haag of Wichita, Kansas. The Kansas Workers Compensation Fund appeared by and through its attorney, Andrew E. Busch of Wichita, Kansas. There were no other appearances.

RECORD

The Appeals Board adopts the record as set forth in the Award of the Special Administrative Law Judge.

STIPULATIONS

The stipulations as enumerated in the Award are herein adopted by the Appeals Board.

ISSUES

The respondent appeals raising only the issue of nature and extent of claimant's disability.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After a review of the whole evidentiary record and hearing arguments of the parties, the Appeals Board finds as follows:

The Special Administrative Law Judge found that the claimant had met with personal injury by a series of accidents which occurred between April 11, 1989, through his last day worked of October 12, 1989, that arose out of and in the course of his employment with respondent. As a result of his work-related injuries, claimant was awarded a thirty-five percent (35%) work disability, and for the following reasons the Appeals Board affirms this Award.

After the claimant's work-related injury, respondent never attempted to return the claimant to his regular work or accommodated work. Accordingly, the question of whether the presumption of no work disability applies is not argued by the respondent. See K.S.A. 1988 Supp. 44-510e(a). Concerning the issue of work disability, two (2) vocational experts testified in this case. Mr. James Molski testified on behalf of the claimant and Ms. Karen Terrill testified on behalf of the respondent. Ms. Terrill, in formulating her opinion on the work disability factors of reduction in claimant's ability to perform work in the open labor market and to earn comparable wage, took into consideration a pre-injury fifty pound (50 lb.) weight lifting restriction. However, Mr. Molski did not consider this pre-injury restriction in his opinion. Consequently, Ms. Terrill in determining the claimant's loss of ability to perform work in the open labor market and to earn comparable wage only included jobs that the claimant could perform pre-injury in the medium category. On the other hand, Mr. Molski considered that the claimant could perform jobs included in the heavy category.

Kenneth D. Zimmerman, M.D., a full-time staff physician employed by the respondent since 1960, testified that a fifty pound (50 lb.) lifting restriction was placed on the claimant after he had completed a pre-employment physical in August of 1988. The reason for the restriction was he found the claimant had scoliosis of the spine and thinning of the lumbosacral disc. However, the claimant testified that he had had no previous history of prior back injuries or symptomatology in his back prior to being employed by the respondent. Claimant testified that his previous employment had required him to lift between one hundred to one hundred fifty pounds (100-150 lbs.) without any problems. He further testified that he had no knowledge that the respondent had placed a fifty pound (50 lb.) lifting restriction on him when he was employed. Except for a diabetes condition, the claimant testified he was in good health when he commenced working for the respondent in August of 1988. The Appeals Board finds that the facts of this case do not support a finding that a pre-existing lifting restriction should be considered in determining claimant's work disability. Therefore, Ms. Terrill's opinion as to the amount, if any, of claimant's work disability will not be considered in this decision as her opinion was determined by taking into consideration a fifty pound (50 lb.) pre-existing lifting restriction.

Claimant was employed by the respondent as a sheet metal assembler which required him to drill holes in hard metal using a pneumatic drill. He first noticed symptoms in his right shoulder in April of 1989. These symptoms increased over a period of months until he was taken off work by Boeing Central Medical on October 16, 1989, with his last day worked being October 12, 1989. The respondent referred the claimant to Dr. Watts, an orthopedic surgeon in Wichita, Kansas, for examination and treatment of his right upper extremity. Dr. Watts first treated claimant with cortisone shots which did not result in any improvement. Dr. Watts finally performed an ulnar nerve decompression of the claimant's right elbow on November 30, 1989. After this surgical procedure, claimant received conservative treatment from Dr. Pollock, Dr. Toohey, and Dr. Snyder, as well as being seen by Boeing Central Medical on a regular basis until December of 1991. Claimant never returned to work and was not offered an accommodated job. He was eventually terminated by the respondent in December of 1991. Fortunately, the claimant was able to find employment and was working as a bindery worker at the time of the regular hearing. The evidentiary record established that post injury the claimant was earning approximately thirty-five percent (35%) less than his stipulated average weekly wage. He was earning \$627.81 as of his last day worked of October 12, 1989, which the Appeals Board finds as the claimant's appropriate date of injury for calculation of benefits.

Two (2) physicians testified in this case, Kenneth D. Zimmerman, M.D., for the respondent, and Ernest R. Schlachter, M.D., for the claimant. Dr. Zimmerman opined that as a result of claimant's work activities he had a seventeen percent (17%) functional impairment to his right upper extremity only, which included his right shoulder. Dr. Zimmerman converted the right upper extremity impairment to a ten percent (10%) body as a whole rating. Permanent work restrictions were placed on the claimant which included no lifting over twenty-five pounds (25 lbs.), limited repetitive use, and limited vibratory tool use of his right arm. Dr. Schlachter, on the other hand, opined that the claimant had suffered permanent injury to both upper extremities including his right shoulder. He assessed an eighteen percent (18%) whole body functional impairment rating. Permanent restrictions included both arms of no single lifts over fifty pounds (50 lbs.), no repetitive lifts of more than thirty-five pounds (35 lbs.), and avoid lifting over five pounds (5 lbs.) above horizontal.

Mr. James Molski, vocational rehabilitation consultant, testified on behalf of the

claimant, without taking into consideration previous pre-existing restrictions, that the claimant's ability to perform work in the open labor market had been reduced by forty to forty-five percent (40-45%) utilizing Dr. Zimmerman's restrictions. Claimant's loss of labor market had been reduced by twenty to twenty-five percent (20-25%) when considering Dr. Schlachter's restrictions. In regard to comparable wage loss, Mr. Molski's opinion was that the claimant had lost between thirty-four to forty-one percent (34-41%). In arriving at his thirty-five percent (35%) work disability award, the Special Administrative Law Judge averaged Mr. Molski's two (2) labor market loss opinions with a thirty-seven and one-half percent (37.5%) average comparable wage loss and weighed both of these factors equally. See Hughes v. Inland Container Corp., 247 Kan. 407, 799 P.2d 1011 (1990).

Claimant argues that the case of Schad v. Hearthstone Nursing Center, 16 Kan. App. 2d 50, 816 P.2d 409, rev. denied 250 Kan. 806 (1991), does not require that both wage loss and loss of labor market be weighed equally. Therefore, in this case it would be more appropriate to weigh the comparable wage loss twice as much as the loss of labor market to arrive at a fifty-five percent (55%) work disability. Respondent contends that the most credible work disability evidence is Ms. Terrill's opinion of between twelve to twenty-five percent (12-25%).

The Appeals Board concludes that the Special Administrative Law Judge's Award entitling the claimant to a thirty-five percent (35%) work disability is appropriate based on the credible evidence in the record and thus affirms the Award.

The Appeals Board, also in affirming this Award, adopts and incorporates in this Order the findings of fact and conclusions of law as stated in the Award of March 11, 1994, to the extent that they are not inconsistent with the findings and conclusions expressed herein.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award entered by Special Administrative Law Judge William F. Morrissey, dated March 11, 1994, should be, and is hereby, affirmed as follows:

AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Everett W. Nixon, and against the respondent, The Boeing Co., and its insurance carrier, Aetna Casualty & Surety Co., and the Kansas Workers Compensation Fund, for an accidental injury which occurred on October 12, 1989, and based on an average weekly wage of \$627.81.

Claimant is entitled to 162.71 weeks of temporary total disability compensation at the rate of \$271.00 per week or \$44,094.41, followed by a payment of \$146.50 per week for 252.29 weeks or \$36,960.49, for a thirty-five percent (35%) permanent partial general work disability, making a total award of \$81,054.90.

As of March 8, 1995, there is due and owing the claimant 162.71 weeks of temporary total disability compensation at the rate of \$271.00 per week or \$44,094.41, plus 119.29 weeks of permanent partial general work disability at \$146.50 per week in the sum of \$17,475.99, for a total due and owing of \$61,570.40, which is ordered paid in one lump sum less any amounts previously paid. Thereafter, the remaining balance of \$19,484.50 shall be paid at the rate of \$146.50 per week for 133 weeks until fully paid or further order of the Director of Workers Compensation.

As per the stipulation entered into by the parties, the Kansas Workers Compensation Fund shall reimburse to the respondent fifty percent (50%) of any and all compensation, medical expenses, and court costs paid in this claim.

IT IS SO ORDERED.

Dated this ____ day of March, 1995.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Kelly W. Johnston, Wichita, KS
Frederick L. Haag, Wichita, KS
Andrew E. Busch, Wichita, KS
William F. Morrissey, Special Administrative Law Judge
George Gomez, Director